PUBLIC PROSECUTOR

v.

HUN PENG KHAI & ORS. & OTHER CASES

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL REVISION NO. 3 OF 1984 (C.T. 13/84, C.T. 14/84 & C.T. 18/84)]
4 JUNE 1984

CRIMINAL LAW AND PROCEDURE: *Offences committed in contravention of s. 39B(1), Dangerous Drugs Act 1952 - Order for transmission to High Court - Section 41A(1), Dangerous Drugs Act 1952 - Jurisdiction - Sections 15, 16, Dangerous Drugs (Amendment) Act 1983 - Amendments - Whether effective retrospectively - Section 30(1), Interpretation Act 1967 - Whether applicable - Articles 7(1), 145(3), Federal Constitution - Effect.*

CONSTITUTIONAL LAW: *Protection against retrospective criminal laws - Article 7(1), Federal Constitution - Power of election of Attorney General - Article 145(3), Federal Constitution.*

STATUTORY INTERPRETATION: *Amendments - Whether retrospective - Section 30(1), Interpretation Act 1967 - Whether applicable.*

The revision was the result of two separate orders for transmission of the above mentioned cases from the Sessions Court to the High Court made by the President pursuant to s. 41A(1) of the Dangerous Drugs Act 1952 (Act 234) (Revised 1980) ("the Principal Act") which were pending before him.

The accused were charged with offences committed in contravention of s. 39B(1) of the Principal Act. In the case of Criminal Trial No. 13/84, all three accused persons were first produced on 3 July 1978 before the President, Sessions Court, when they were charged. On 14 April 1984, the President transmitted the case to the High Court for trial though there was no requisition for this by the Public Prosecutor. Regarding the cases comprised in Criminal Trial Nos. 14 & 18/84, all the accused first appeared before the President on 16 December 1982. Their cases too were transmitted to the High Court on 14 April 1984.

The main question arising in the matter of the revision was whether ss. 15 and 16 of the Dangerous Drugs (Amendment) Act 1983 ("the Amending Act") which confer exclusive jurisdiction on the High Court to try offences in contravention of s. 39B(1) of the Principal Act, have the effect of taking away the jurisdiction of the Sessions Court even with regard to cases pending trial before the latter prior to the Amending Act.

Held:

[1] The Principal Act and the Amending Act must both fall to be construed in accordance with the Interpretation Act, 1967, and the saving provisions of s. 30(1) of the Interpretation Act applied to confer upon the accused persons the right to trial in the Sessions Court.

[2] The provisions of the Amending Act were not retrospective, either by express enactment or by necessary implication.

[3] In the circumstances of the case, the accused persons had a vested right to trial in the Sessions Court, and ss. 15 and 16 of the Amending Act in no way deprived them of that right.

[4] The unreported judgment of Shaik Daud J in *PP v. Jusoh b. Samah* in Kuantan Criminal Trials 1 & 4/84 should not have been regarded as binding on the prosecution.

(a) The judgment was given *per incuriam.*

(b) The Amending Act affected not only amendments but also repeals.

(c) The irresistible inference to be drawn from the fact that the Dangerous Drugs (Amendment) Act 1978, (Act 426), though it made transitional provisions for pending preliminary enquiries and trials pending in the Magistrate's Courts and trials pending in the High Court under s. 7 of that Act, was silent on trials pending in the Sessions Court in that the latter were to proceed without interruption.

The same inference must be drawn in the case of the Amending Act, since it too refrained from making any mention of trials pending in the Sessions Courts. A beneficial rather than a strict construction of the statutes must be made.

[5] Even assuming ss. 15 and 16 of the Amending Act had retrospective operation and the saving provisions of s. 30(1), Interpretation Act did not apply, amendments effected by ss. 15 and 16 of the Amending Act were nevertheless vitiated as they violated Article 7(1) of the Constitution.

[6] In any case, as the orders for transmission were made in the absence of a requisition by the Public Prosecutor under s. 41(2) of the Act, they were invalidated on the ground that they were made in derogation of the right of election of the Public Prosecutor. The Attorney-General having elected for trial in the Sessions Court, ss. 15 & 16 of the Amending Act came within the constitutional inhibitions of Article 145(3) of the Federal Constitution.

[Cases restored to Sessions Court, Penang, for hearing and determination]

Cases referred to:
PP v. Dato Harun Idris [1977] 1 MLJ 14
Chang Liang Sang & Ors. v. PP [1982] 2 MLJ 231; [1982] CLJ (Rep) 74
Lewis v. Hughes [1916] 1 KB 831
Henshall v. Porter [1923] 39 TLR 409
Kay v. Goodwin [1830] 6 Bing 576
Colonial Sugar Refining Co. v. Irving [1905] AC 369
United Provinces v. Atiqa Begum [1940] FCR 110
Ramzan v. Azizi [1976] Crim LJ 897
Venugopala Reddiar v. Krishnaswamy Reddiar [1943] AIR SC 24
Hazari Tewari v. Mt. Maktula [1932] AIR Allahabad 30
Bus Service Ltd. v. H.B. Sethna [1965] AIR Madras 149
Dilworth v. Stamps Commrs.; Dilworth v. Income Tax Commrs. [1899] AC 99
Kutner v. Phillips [1891] 2 QB 267
Maryon-Wilson's Will Trusts [1968] Ch 268
PP v. Lim Chui Wong & Ors. [1979] 1 MLJ 65
PP v. Mohd. Ismail s/o Mohd. Sultan [1983] CLJ (Rep) 788
Baker & Anor. v. The Queen [1975] 3 All ER 55
In re Special Courts Bills 1978 [1979] AIR SC 478
Attorney-General for British Columbia v. Attorney-General for Canada [1937] AC 326
In re The Initiative and Referendum Act [1919] AC 935
Ahlyabai Tiwari v. R.G. Bapu & Ors. [1954] AIR Nagpur 264

Legislation referred to:
Dangerous Drugs Act 1952, ss. 39B(1), (2), (3). 41(1), 41A(1)
Dangerous Drugs (Amendment) Act 1978, ss. 7(1), 14, 15, 16
Federal Constitution, arts. 7(1), 145(3)
Interpretation Act 1967, ss. 30(1), 35(2)
Courts of Judicature Act 1964, s. 66(1)

Other sources referred to:
Craies On Statute Law, 7th Edn., para 402/3
Maxwell on Interpretation of Statute, 11th Edn., pp. 274 & 275

For the public prosecutor - Nordin b. Haji Sulaiman DPP, Penang
For Hun Peng Khai - Danny Navarednam; M/s. R. Rajasingam & Co.
For New Ah Kaw - V. Sithambaram; M/s. Kumar & Co.
For Tan Liang Peng - Karpal Singh; M/s. Karpal Singh & Co.
For the Last 4 accused - Danny Navarednam; M/s. R. Rajasingam & Co.

JUDGMENT

Edgar Joseph Jr J:

This Revision, which I heard five days ago, at the behest of the defence, is a direct result of two separate Orders for Transmission of the above mentioned cases from the Sessions Court to the High Court made by the learned President pursuant to s. 41A(1) of the **Dangerous Drugs Act 1952** (Act 234) Revised 1980) ("the Principal Act") which were pending trial before him and are now comprised and registered in this Court as Criminal Trial Nos. 13/84, 14/84 and 18/84, respectively.

The dominant question of law of general public importance, arising and common to all three cases, is a broad one, and may be stated thus: "Whether ss. 15 and 16 of the **Dangerous Drugs Amendment) Act 1983** ("the Amending Act") which confer exclusive jurisdiction on the High Court to try offences in contravention of s. 39B(1) of the Principal Act has the effect of taking away the jurisdiction of the Sessions Court even with regard to cases pending trial before the latter prior to the coming into force of the Amending Act?"

Before its amendment, s. 39B(2) of the Principal Act which prescribed the penalty for trafficking in a dangerous drug and its kindred offences in contravention of s. 39B(1), read as follows:

> Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Ordinance and shall be punished on conviction with death or imprisonment for life and shall if he is not sentenced to death, also be liable to whipping.

After its amendment, by s. 14 of the Amending Act, the words "or imprisonment for life and shall if he is not sentenced to death, also be liable to whipping" were **deleted** thus providing for the mandatory death sentence upon conviction for all offences in contravention of s. 39B (1) of the Principal Act so that it now reads as follows:

> Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Ordinance shall be punished on conviction with death.

Before its amendment, subsection (1) of s. 41 of the Principal Act read as follows:

> A **Sessions Court** shall have jurisdiction to try **all offences** under this Act and to impose the full punishment or penalty provided for any such offence by this Act or by any regulations made thereunder, except the penalty of death.
> (emphasis supplied)

After its amendment, by s. 15 of the Amending Act, there was **substituted** the following subsection:

> (1) A Sessions Court or a Magistrate's Court presided over by a Magistrate of the First Class shall have jurisdiction to try any offence under this Act, **except an offence under s. 39B,** and power to impose in any offence so tried the full punishment or penalty provided for that offence by this Act or by any regulations made thereunder, then, in the case of a Magistrate's Court, imprisonment exceeding five years.
> (emphasis supplied)

After its amendment, by s. 16 of the Amending Act, the words "is triable exclusively by the High Court or" were inserted immediately after the words "under this Act," so that subsection (1) of s. 41 now reads as follows:

> Where any case in respect of an offence under this Act **is triable exclusively by the High Court or** is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate Court which shall after the charge has been explained to him transmit the case to the High Court without holding a preliminary enquiry under Chapter XVII of the Criminal Procedure Code and cause the accused person to appear or be brought before such Court as soon as may be practicable.
> (emphasis supplied)

The very first issue which arises for the determination of this Court is whether the amendments effected by ss. 15 & 16 of the Amending Act have retrospective effect.

It is true that it is not unknown for Parliament to legislate with retrospective effect so that the law of tomorrow becomes the law of yesterday. It is equally true that no one has a vested right in procedure *(PP v. Dato Harun Idris* [1977] 1 MLJ 14). However, this rule of construction is subject to the important qualification that where rights are vested in or accrued to a party they are not affected by a repeal or amendment to statute even if it relates to procedure.

The question which arises on this part of the case is whether the accused person in Criminal Trial Nos. 13, 14 and 18 of 1984 had a vested or accrued right to be tried by the Sessions Court prior to the date of the coming into force of the Amending Act.

This is a matter of the utmost gravity because if the question is answered in favour of the accused persons, then, if convicted, they could only be sentenced to life imprisonment and, in addition, be liable to whipping whereas, in a High Court trial ending in a conviction, they would be liable to a sentence of death or life imprisonment with or without whipping. In practice, in the absence of very extenuating circumstances, such a conviction following a High Court trial would attract the death sentence: see *Chang Liang Sang & Ors. v. PP* [1982] CLJ (Rep) 74.

It may also be said, though I do not place undue stress on this, that in the case of a trial originating in the Sessions Court, the accused has two rights of appeal, one to the High Court and a limited right of appeal by way of a reference to the Federal Court under s. 66 (1) of the **Courts of Judicature Act 1964,** whereas, in a trial originating in the High Court there is only one right of appeal to the Federal Court.

This brings me to a consideration of a history of the proceedings in all three cases.

In the case of Criminal Trial No. 13/84, all three accused persons were first produced on 3 July 1978 before the President, Sessions Court, when they were charged, no plea being taken, and the case fixed for further mention on 24 July 1978.

Thereafter, they were produced at intervals of not more than one week on numerous occasions until 24 November 1978, when the first and second accused claimed to be tried and the Prosecuting Officer applied for, and was granted, an order of discharge not amounting to an acquittal insofar as the third accused was concerned. The record provided does not show why he did so but, be that as it may, he then applied, successfully, for the case to be transmitted to the High Court under s. 41A(1) of the Act.

The next entry in the record is dated 19 April 1982! This leaves a yawning gap of nearly three-and-a-half years and I am left to guess what happened during that interval. Be that as it may, on that day, pursuant to Consents to Prosecute signed by the learned Deputy Public Prosecutor under s. 39B (3) dated 22 March 1982, the first and second accused were again charged in the Sessions Court and the case fixed for hearing on 11 October 1982.

Thereafter, they were produced at not more than weekly intervals, on numerous occasions, until 11 October 1982, when they were joined in the dock, once again, by the third accused and when a final postponement to 23 & 24 March 1983, for the hearing, was granted upon application by the defence. However, the trial did not proceed on that day as, again, one of the defence Counsel was engaged in the High Court and another was in England.

At long last, on 20 October 1983, a joint trial of all three accused persons commenced after they had each claimed trial and, one witness, Sgt. Maj. Mokhtar, gave evidence. The case was then again postponed to 21 October 1983. On that day, upon the request of the prosecution, the Court granted yet another postponement to 21, 22, 23 November, 1983, for continued hearing, "as the investigating officer is on a field job and cannot be traced for the moment." Again, the case did not proceed for hearing on the appointed continuation dates, as the Court was engaged in a corruption case and one of the defence Counsel was engaged in the High Court. This time the case was adjourned for continued hearing on 3 & 4 April 1984.

Thereafter, the accused were produced at not more than weekly intervals until 3 April 1984 when, on the request of the Court, the prosecution and the defence were invited by the President, Sessions Court, to make submissions as to whether the Court had jurisdiction to try the cases. The case was then adjourned to 12 April 1984 for this purpose. On that day, however, the case was again postponed to two days later for reasons which do not appear in the record. On 14 April 1984, after hearing submissions by both the prosecution and the defence, the prosecution having taken the stand that the unreported judgment of Shaik Daud J. in Kuantan Criminal Trials Nos. 1 & 4 of 1984 "being on all fours with the case before this Court, the prosecution feels bound by that decision," the learned President transmitted the case to the High Court for trial, even though there was no requisition for this by the Public Prosecutor.

From the above history, it is patently clear that the cases comprised in Criminal Trial No. 13/84 could easily have been disposed of long before the Amending Act came into force had all concerned displayed a more responsible attitude.

I cannot leave this part of the case without recording my grave displeasure at the intolerable delay in the disposal of these cases. They have not only occasioned grave injustice to the accused persons by keeping them in suspense whilst in custody for nearly five years but are also a public scandal. I can only express the pious hope that nothing of the sort will happen again.

So far as the cases comprised in Criminal Trials Nos. 14 & 18/84 were concerned, all three accused persons first appeared before the President, Sessions Court, on 16 December 1982, when they were charged, the cases postponed to 17 February 1983 for further mention and a further remand order made.

Thereafter, they were produced on numerous occasions, at intervals not exceeding one week, until 15 March 1983, when the case was again mentioned, the charge amended, and pursuant to a Consent to Prosecute marked P1, dated 10 March 1983, the case set down for hearing on 17 January 1984 and a further remand order made. They were then produced at intervals of not more than one week, on numerous occasions, each time with the necessary remand orders. However, on 10 January 1984, upon being further remanded, the date of hearing was altered to 12 April 1984. The record does not show why. Again, there were the usual productions at intervals of not more than one week for the necessary remand orders.

However, on 2 April 1984, the case was not heard but merely stood down. Later that day, at about 10.41 a.m., the President noted that he had perused his minutes in Arrest Case No. 135/82 and, having done so, he adjourned the case to 12 April 1984 but, it was not until 14 April 1984, that the accused were next produced. They were all represented by Counsel and the Court made a similar order of transmission to the High Court as in the case of Criminal Trial No. 13/84 even though there was no requisition for this by the Public Prosecutor.

I must now examine the legal position to determine whether s. 30 (1) of the **Interpretation Act 1967,** applies so as to render invalid the orders of transmission. The subsection reads as follows:

> The repeal of a written law in whole **or in part** shall not-
>
> (a) affect the previous operation of the repealed law or anything duly done or suffered thereunder or; or
>
> (b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; or
>
> (c) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under the repealed law; or
>
> (d) affect any investigation, **legal proceeding** or remedy **in respect of any such right, privilege, obligation, liability, forfeiture or punishment,**
>
> and any such investigation, legal proceeding or remedy may be instituted, **continued** or enforced, and any such penalty forfeiture or punishment may be imposed, **as if the repealing law had not been made.**
> (emphasis supplied)

It should be noted at the outset that unlike the U.K. **Interpretation Act of 1889** ours does not provide that a repeal is to have certain savings only if a contrary intention does not appear in the repealing Act. The importance of this is exemplified by cases as *Lewis v. Hughes* [1916] 1 KB 831; *Henshall v. Porter* [1923] 39 TLR 409 and *Kay v. Goodwin* [1830] 6 Bing 576.

The next preliminary matter which deserves notice is s. 2(1) of Act 40/68 which provides that the **Interpretation Act**"... shall apply for the interpretation of and otherwise in relation to -

> (a) this Act and all Acts of Parliament after the coming into force of this Act;
>
> (b) all laws, whether enacted before or after the commencement of this Act, revised under the Revision of Laws Act, 1968;

(c) ...

(d) ...

(e) ...

(2) This Act shall not apply for the interpretation of or otherwise in relation to any written law not enumerated in subsection (1).

The Principal Act and the Amending Act must both therefore fall to be construed in accordance with the **Interpretation Act.**

I now turn to consider ss. 15 & 16 of the Amending Act which, as has been seen, transfer the forum of trial of all offences under s. 39B(2) of the Principal Act from the Sessions Court to the High Court.

Forty-five years ago the Judicial Committee of the Privy Council in *Colonial Sugar Refining Co. v. Irving* [1905] AC 369, had to consider the question whether a statute which took away a right of appeal was to be regarded as a matter of procedure. Their Lordships held that it could not be so regarded. The timetable of events was this: the action in which the appeal was brought was commenced on 25 October 1902, the **Judiciary Act 1903,** which took away the power of the Court below to give leave to appeal came into force on 25 August 1903 but leave to appeal was only given on 4 September 1903.

Lord Macnaghten delivering the advice of the Board (*Craies On Statute Law*, 7th Edn. at 402/3), said this:

> As regards the general principles applicable to the case there was no controversy. On the one hand it was not disputed that if the matter in question be a matter of procedure only, the petition (to dismiss) is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the (Judiciary) Act, it was conceded that in accordance with a long tine of authorities from the time of Lord Coke to the present day the appellants [the Sugar Co.] would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure.

It is important to note that in their Lordships' opinion a right of appeal vests in a suitor on the date of commencement of the action. The reason for this may be that when a litigant commences an action he acts on the expectation that a right of appeal under a law then in force will not be abrogated.

In more recent times, in India, Sir Shah Sulaiman had some interesting observations to make with regard to statutes which take away the jurisdiction of the Courts. This is how His Lordship put it in the case of *United Provinces v. Atiqa Begum* [1940] FCR 110.

> The intention of the legislature has to be gathered from the language employed in the Act. For statutes which confer or take away legal rights, whether public or private, or alter the jurisdiction of Courts of Law, express and unambiguous words are necessary. No loopholes should be left for escape ... **It is a well recognised rule that statutes should as far as possible be so interpreted, as not to affect vested rights adversely, particularly when they are being litigated. When a statute deprives a person of his right to sue or affects the power of jurisdiction of a Court in enforcing the law as it stands, its retrospective character must be clearly expressed.** (Emphasis added)

Then, not so long ago, in 1976, Mufti J delivering the dissenting judgment in *Ramzan v. Azizi* [1976] Crim LJ 897, after carefully analysing *Colonial Sugar Refining Co. v. Irving (supra); Venugopal Reddiar v. Krishnaswamy Reddiar* [1943] AIR SC 24; *Hazari Tewari v. Mt. Maktula* [1932] AIR Allahabad 30; *Bus Service Ltd. v. H.B. Sethna*[1965] AIR Madras 149, concluded that the principle to be distilled from the cases was that where a change of forum touched a vested right statutory law providing for such alteration will not be construed retrospectively to affect that right and ended with the following telling observation:

> Merely because the amending Act provided for the power and jurisdiction of the Executive Magistrate shall be exclusive it does not follow that the amending Act was intended to affect pending actions. It will perhaps be too much to hold so.

I prefer the judgment of Mufti J to the majority judgment of Jaswant Singh CJ because the latter does not contain anything like the detailed reasoning and analysis of the cases appearing in the former. In any event, the majority judgment in the final paragraph concedes that the result would be different if the amending Act affects a fundamental right.

My conclusions as regards this part of the case are, therefore, as follows:

(1) the provisions of the Amending Act are not retrospective by express enactment or by necessary implication;

(2) once the accused persons in this case were charged and their cases fixed for hearing in the Sessions Court before the coming into force of the Amending Act, that gave them a vested right to trial in that Court. Consequently, so far as cases such as these are concerned, ss. 15 & 16 of the Amending Act can in no way deprive an accused person of this right.

I would therefore answer the question posed in paragraph two of this judgment in the negative.

I must now consider the as yet unreported judgment of Shaik Daud J in *PP v. Jusoh v. Samah* in Kuantan Criminal Trials 1 & 4/84.

It would appear that His Lordship who did not have the advantage of an argument as full as that which Counsel addressed to this Court and to whom none of the authorities referred to herein except the cases of *Lim Chui Wong* and *Mohd Ismail* (only in passing, as regards sentence) ruled against the accused persons on the same question which arises on this Revision. That judgment must therefore be regarded as having been given *per incuriam.*

Next, his Lordship thought that s. 30 of the **Interpretation Act 1967,** did not apply because the Amending Act merely effected amendments and not repeals. To test this proposition it is necessary to reproduce the following provisions in s. 3 of the **Interpretation Act:**

> 3. The following words and expression have the meanings hereby respectively assigned to them, that is to say -
>
> amend" includes repeal, add to and vary;
>
> repeal" includes rescind, revoke, cancel and replace.

Three considerations must be kept in mind before s. 15 & 16 are examined to determine whether they effect repeals:

First, an Amending Act may effect a repeal since the word "amends" includes repeals though it is true this is not necessarily so as the word "includes" is a word of extension and not of definition: *Dilworth v. Stamps Commrs.; Dilworth v. Income Tax Commrs.* [1899] AC 99, PC *per cur.,* at 105, 106.

Second, a repeal of a written law may be in whole or in pArticle This is clear from the opening words s. 30(1) of the **Interpretation Act** which reads:

> The repeal of a written law in whole or in part shall not -
> ...

and from s. 35 (2) of the **Interpretation Act** which provides:

> Where any written law or any provision of a written law is repealed ...

Third, a repeal need not be express and can even be implied. This would be so where, for example, the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together (per Smith LJ in *Kutner v. Phillips* [1891] 2 QB 267, 272).

Clearly, s. 14 of the Amending Act, which it will be recalled provides for the deletion of the option of life imprisonment with liability to whipping, is an express repeal within s. 3 of the **Interpretation Act** as I take it that the word "delete" means "cancel". Similarly, the "substitution" of a new s. 41 (1) by s. 15 of the Amending Act operated to "replace" the old s. 41 (1) in the Principal Act.

Again, the effect of s. 16 of the Amending Act which it will be recalled provided for insertion of the words "is triable exclusively by the High Court or" operated to take away or "revoke" or "cancel" the jurisdiction previously enjoyed by the Sessions Court and to vest it in the High Court. It is therefore in every sense a repeal within the meaning of s. 3 of the **Interpretation Act.**

A further reason given by Shaik Daud J. for holding in favour of ouster of the jurisdiction of the Sessions Court was that whereas s. 7(1) of the **Dangerous Drugs (Amendment) Act 1978,** (Act 426) made transitional provisions for preliminary enquiries pending in the Magistrates' Courts and trials pending in the High Courts, the Amending Act was silent as to such matters. Section 7(1) of Act 426 reads as follows:

> Where, immediately before the commencement of this Act,-
>
> (a) there is pending before a Subordinate Court any preliminary inquiry under Chapter XVII of the Criminal Procedure Code in respect of an offence under the Ordinance, the case shall be transmitted by such subordinate court to the High Court without holding or completing, as the case may be, such preliminary inquiry, and the subordinate court shall cause the accused person to appear or be brought before the High Court as soon as practicable, thereafter, the provisions of subsections (2), (3) and (4) of s. 41A of the Ordinance as substituted by s. 5 of this Act shall apply to its trial before the High Court; or
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> (b) there is pending before the High Court any case in respect of an offence under the Ordinance, then,-
>
> (i) if the trial thereof has already commenced, the trial shall proceed and be completed as if s. 41A of the Ordinance as substituted by s. 5 of this Act did not apply to that case; or
>
> (ii) if the trial thereof has not yet commenced, the case shall be deemed to have been transmitted to the High Court in accordance with subsection (1) of s. 41A of the Ordinance as substituted by s. 5 of this Act, and the provisions of subsections (2), (3) and (4) of the said s. 41A shall apply to the trial in the High Court.

With respect, I am of the opposite opinion. The Act A426 whilst making transitional provisions for pending preliminary enquiries and trials in the High Court studiously refrained from touching on trials pending in the Sessions Courts. The irresistible inference is that trials pending for hearing in the Sessions Courts were to proceed without interruption.

Bearing this in mind, it is also an irresistible inference that Session's Court jurisdiction in respect of trials pending for hearing was to continue unabated upon the coming into force of the Amending Act since it, too, studiously refrained from making any mention of them.

The modern trend of judicial construction of statutes shows that generally, Courts lean in favour of a beneficial rather than a strict construction and I find support for this in the following passage in *Maxwell on Interpretation of Statutes,* 11th Edn., pp. 274 & 275:

> The tendency of modern decisions, upon the whole, is to narrow materially the difference between what is called a strict and a beneficial construction. All statutes are now construed with a more attentive regard to the language, and criminal statutes with a more rational regard to the aim and intention of the legislature, than formerly. It is unquestionably right that the distinction should not be altogether erased from the judicial mind, for it is required by the spirit of our free institutions that the interpretation of all statutes should be favourable to personal liberty, and this tendency is still evinced in a certain reluctance to supply the defects of language, or to eke out the meaning of an obscure passage by strained or doubtful influences. The effect of the rule of strict construction might also be summed up in the remark that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. But it yields to the paramount rule that every statute is to be expounded according to its expressed or manifest intention and that all cases within the mischiefs aimed at are, if the language permits, to be held to fall within its remedial influence.

A most helpful illustration of the application of the rule of beneficial constructions is to be found in the following passage of the judgment of Ungoed-Thomas J in *Maryon-Wilson's Will Trusts* [1968] Ch. 268, 282;

> If the Court is to avoid a statutory result that flouts common sense and justice it must do so not by disregarding the statutes or overriding it but by interpreting in accordance with the judicially presumed parliamentary concern for common sense and justice.

Before I leave this part of the case, mention must be made of a parallel right conferred on the Attorney-General to elect in which Court, whether the High Court or the Sessions Court, to prosecute persons charged under s. 39B (1) of the Act. That he had such a right under Article 145 (3) prior to the Amending Act has been wellsettled: (see *PP v. Lim Chui Wong & Ors.* [1979] 1 MLJ 65, 67). That he had such a right independently of Article 145 (3) is clear from a reading of s. 41 (1) & (2) of the Act prior to its amendment. That he continues to enjoy this right, independently of Article 145 (3), by reason of the effect of s. 30 (1) of the **Interpretation Act** on ss. 15 & 16 of the Amending Act, I have no doubt. Consequently, the Orders for Transmission to the High Court hereinbefore referred to, having been made in the absence of a requisition by the Public Prosecutor under s. 41 (2) of the Act, were made in derogation of this right and are, on this ground, too, invalidated.

On a further ground, also, the dominant question of law posed at the outset of this judgment must be answered in favour of the accused persons.

Assuming ss. 15 & 16 of the Amending Act have retrospective operation and the saving provisions of s. 30(1) **Interpretation Act** do not apply to confer upon these accused persons the right to trial in the Sessions Court, then, I consider it necessary to state my views

regarding the relevance of Article 7 (1) of the **Constitution**. I do so despite the fact that when I invited Mr. Karpal Singh, who argued the case for the accused persons, to address me on this question he thought it did not assist him. With respect, it does.

A careful reading of the statutory provisions of the Principal Act and the Amending Act, reproduced above, will show that the **primary purpose** of the Amending Act was to substitute the mandatory death sentence for the offence of trafficking in a dangerous drug and its kindred offences in lieu of the previous punishment provided which was death or imprisonment for life and liability to whipping. The other amendments relating to the ouster of the jurisdiction of the Sessions Court to try such offences being merely **consequential** to such primary purpose.

In arriving at this conclusion I have merely taken into account the history of the legislation without giving any consideration to cl. 12 of the Explanatory Statement although it confirms this view since it reads:

> 12. Clause 14 seeks to alter the existing punishment of death or imprisonment for life for the offences of trafficking in a dangerous drug, offering to traffic in a dangerous drug or doing offering to do an act preparatory to or for the purpose of trafficking in a dangerous drug, to a punishment of death only, and cl. 15 and 16 seek to amend ss. 41 and 41A to effect consequential changes.

This brings me to the case of *PP v. Mohd. Ismail s/o Mohd. Sultan* [1983] CLJ (Rep) 788, a prosecution for trafficking in a dangerous drug in contravention of s. 39B (1) of the Principal Act, in which I had to consider the question of law, "what is the material date for determining sentence for offences under s. 39B (1), is it the date of offence or date of conviction?" and I concluded, on the authority of the Privy Council case of *Baker & Anor. v. The Queen* [1975] 3 All ER 55, that it is the date of conviction. The effect of this was that *prima facie*, there being no saving clause in the Amending Act to the effect that this amendment shall not apply to offences committed prior to the date of its coming into force, I held that s. 39B(2) is retrospective.

However, so far as such offences were concerned, I was of opinion, fortified by another passage in the judgment of Lord Diplock in *Baker's* case, at p. 61 b to f, that it violates Article 7 (1) of our Constitution as it subjected such accused persons to greater punishment than was prescribed by law at the time the offence was committed.

On reflection, I see no reason to depart from anything I said in *Mohd. Ismail's case (supra)* and, indeed, I am further fortified in that view by the decision of the Indian Supreme Court by *In re Special Courts Bills 1978* [1979] AIR SC 478, which lays down, *inter alia,* the proposition that a law may be valid in respect of offences alleged to have been committed during the particular period and yet invalid as being unconstitutional insofar as it covered offences committed before that period.

Now, how is all this relevant to the question arising on this Revision? It is relevant in this way: if the primary amendment introducing the mandatory death sentence, so far as pre-amendment offences are concerned, violates Article 7 (1), then, surely the consequential amendments as to jurisdiction effected by ss. 15 & 16 of the Amending Act, must, even if they are retrospective, be likewise fatally vitiated. They are, after all, fruits of the poisoned tree.

In my search for authorities I have uncovered certain cases which I consider germane to this issue.

In *Attorney-General for British Columbia v. Attorney-General for Canada* [1937] AC 326 at 388 penultimate line at 389, the Judicial Committee of the Privy Council held that the Natural Products Marketing Act, 1934, of the Parliament of Canada, invaded the separate legislative preserve of the Provinces and could not be saved. A peculiar feature was that some of the Provinces supported marketing schemes such as could be established under the Act and had set up on their own Provincial schemes, but since the Act affected intra-Provincial opportunity as well as inter course between Provinces and since the *ultra vires* part could not be excised the whole Act had to be struck down. In that context, Lord Atkin upholding the view that the sections said to be severable were in fact incidental and ancillary to the main legislation said:

> In the first place, it appears to their Lordships that **the whole texture of the Act is inextricably interwoven,** and that neither s.9 nor Part II, **can be contemplated as existing independently** of the provisions as to the creation of a Board and the regulation of products. ... In the second place, both the Dominion and British Columbia, in their Cases filed on this appeal assert that **the sections now said to be severable are incidental and ancillary to the main legislation.** Their Lordships are of opinion that this is true; and that **as the main legislation is invalid as being in pith and substance an encroachment upon the Provincial rights the sections referred to must fall with it as being in part merely ancillary to it.**
>
> (emphasis supplied)

And, this is what Viscount Haldane said in *In re The Initiative and Referendum Act* [1919] AC 935 at 944:

> These considerations are sufficient to establish the *ultra vires* character of the Act. The offending provisions are in their Lordships' view so interwoven into the scheme that they are not severable. The Colonial Laws Validity Act, 1865 (1),therefore, which was invoked in the course of the argument, does not assist the appellants.

And, this is what Mudholkar & Choudhuri JJ said in *Ahlyabai Tiwari V.R.G. Bapu & Ors.* [1954] AIR Nagpur 264, @ 266 col. 2 para. 8:

> (8) It is, no doubt, a well-known principle of construction that when a law happens to be unconstitutional in part, the whole of the law does not necessarily fail. But when the valid part of a law is so clearly dependent and so inseparably connected with the invalid part that they cannot be separated without defeating the object of the statute, that part must also fall with the part which is invalid.

As stated by Crawford at p. 216 in his Statutory Construction:

> In determining separability, the test is whether the Legislature has manifested an intention to deal with a part of the subject-matter covered, irrespective of the rest of the subject-matter, if such an intention is manifest, the subject-matter is separable. If the valid parts are complete in themselves and independent of the invalid parts and capable of being executed according to the intention of the Legislature, they must be sustained by the Court, notwithstanding partial invalidity. The invalid parts, however, may be dropped only where the part which is retained is fully operative as a law. And where the invalid and the valid parts are independent and essentially and inseparably connected in substance, there is a strong presumption that the Legislature would not have enacted one part without the other, and the entire statute will fall.
>
> A similar result will occur where all the provisions of an Act are connected as parts of single scheme. In such a case, if the main object or purpose is invalid, those provisions which are incidental will also fall. But in any instance, there is a presumption that the Legislature intended for the statute or Act to be effective in its entirety, unless something in the Act indicates to the contrary.

Finally, if contrary to my above conclusions:

(1) Sections 15 & 16 of the Amending Act have retrospective operation;

(2) the saving provisions of s. 30 (1) of the **Interpretation Act** do not apply, and

(3) Article 7 (1) cannot be prayed in aid of these accused persons,

then, it is my opinion, that the Attorney-General having elected for trial in the Sessions Court, ss. 15 & 16 come within the constitutional inhibitions of Article 145 (3).

In the result, reason and justice combine to indicate that both the Order of Transmission are illegal, void and of no effect; they are accordingly quashed, all the cases concerned restored to the Sessions Court, Penang, with a direction to hear and determine them according to law, as expeditiously as possible. The accused persons are, in the meanwhile remanded in custody pending the final determination of their respective trials.

Also found at [1984] 2 CLJ 290